

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	

COMMENTS OF NTCH, INC.

NTCH, Inc. (NTCH) hereby offers these brief comments in relation to three discrete aspects of the landmark Notice of Proposed Rulemaking which the Commission has initiated in this Docket. As a frequent user of backhaul services provided by the limited number of service providers in any given area, NTCH can attest to the serious lack of competition in most discrete markets for these services. This circumstance makes it possible for the service providers to offer service only at rates which would never be acceptable if there were any significant level of competition to discipline them. The Commission has here taken the bull by the horns in a way which will ultimately serve to lower prices not only to the wireless carriers who rely on backhaul to connect their facilities to the internet or to other facilities, but also to the downstream consumers who must ultimately bear the burden of exorbitant and unreasonable rates charged by providers in the distribution chain. The regulatory scheme proposed by the Commission promises to intervene in non-competitive markets so as to prevent the clear abuses which have become the norm rather than the exception in this

industry. There are several features of the Commission's proposal, however, that should be strengthened.

## **I. Nondisclosure Agreements**

At Paragraphs 313-320 of the NPRM, the Commission addresses the problem which has been posed by the ubiquitous NDAs which preclude parties from disclosing the terms of their backhaul agreements not only to other parties but to the Commission itself. This cloak of secrecy has had the effect of preventing the Commission from properly exercising its regulatory duties because it cannot learn the rates that are being offered in order to assess whether the rates are reasonable and non-discriminatory. The Commission floated various measures that would ameliorate the specific problem of limiting the Commission's access to rate data, but it seemed to accept as a given the proposition that rate information should otherwise be treated as highly confidential and proprietary. NTCH believes that that proposition is in fact a false one which undermines the statutory scheme and has contributed significantly to the very lack of competition which the NPRM attempts to remediate.

The scheme of the 1934 Act contemplates rates being publicly tariffed or otherwise being publicly available. Section 203 of the Act requires common carriers to file with the Commission and "print and keep open for public inspection schedules showing all charges for itself and its connecting carriers..." Section 211 requires every carrier subject to the Act to "file with the Commission copies of all contracts, agreements or arrangements with other carriers..." These foundational elements of the Act were carried forward from the ICC regulatory framework applicable to railroads. The public filing of rates and contracts made it impossible for carriers to engage in secret price concessions or preferences on terms and conditions which had been a constant problem with railroad carriage in the late 19<sup>th</sup> and early

20<sup>th</sup> century. The wisdom of this approach is that it permitted the industry to regulate itself by making all charges public; each carrier could tell if it was being treated unlawfully because everybody knew what everybody else was being charged. And, of course, the Commission itself could apprehend and monitor when distortions in the marketplace were occurring because all of the necessary information was in its own files.

In the last few decades, the Commission has somehow gotten away from the strong statutory preference for fully transparent rates and charges to an assumption that the *opposite* is true – that rates and terms somehow need to be kept secret to protect “commercially sensitive information.” But why? There is no reason why rates and terms should be deemed “commercially sensitive” when they are simply a commodity which must, by law, be offered on a nondiscriminatory, just, and reasonable basis. It is unclear how the statutory commands in this regard came to be subverted. We know that in the wireless field, the Commission did away with tariffs in 1994 and at the same time ruled that because the cellular market was fully competitive, there was no need for contracts to be filed pursuant to Section 211. It therefore forbore from the obligation for contracts to be filed. Whether the highly competitive marketplace that the Commission based its 1994 forbearance decision on is still extant is the subject of a “Petition to Rescind Forbearance and Initiate Rulemaking” which NTCH filed two years ago. For reasons which are unclear, the Commission has not acted on the petition in any way, despite the *prima facie* showing made in the petition that the wireless marketplace is no longer competitive and that the lack of public information about rates is directly harming consumers.<sup>1</sup>

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<sup>1</sup> See “Petition to Rescind Forbearance and Initiate Rulemaking” filed July 2, 2014. This Petition updated and expanded upon an earlier version of the same petition filed on November 22, 2013.

As was explained in the 2014 Petition in connection with roaming rates, the same rationale applies to backhaul rates. Transparency of information about the rates being charged should lead to increased competition among carriers by making the rates be known and bettered by other carriers. If prices are kept secret, as the current system permits, no competitor can know for sure what rates a given telecom service provider is offering other customers, and even the customers themselves cannot disclose the rate they are getting because they too are bound by NDAs. That precludes true competition, which is based on multiple competitors knowing what terms and conditions the other competitors are making available so that those rates and terms can be bettered. So long as rates are secret, a large carrier could grant a huge rate concession to another large company, even a foreign owned monopolistic operator, unbeknownst to other backhaul users. This would allow the foreign company to come in and effectively stifle the growing momentum of home bred competitors which are offering greater simplicity and value to American consumers. The fact that the largest carriers try to keep their rates and terms secret suggests in itself that this secrecy facilitates their ability to charge unjust and discriminatory rates without anyone – customers, other carriers, or the Commission – being any the wiser.

The fact that the Commission has acknowledged that NDAs disserve the public interest by preventing the Commission itself from knowing the rates that are being tendered to different users is enough in itself to require the rescission of any forbearance from the normal mandate of Section 211 that all contracts be made publicly available.

What NTCH suggests here, therefore, is that the Commission not stop at half measures to curb the abuses engendered and fostered by NDAs; it should go all the way and abolish

them completely. There is no valid public interest purpose to be served by keeping such information secret in contravention of the statutory scheme.

## **II. The Forbearance Rescission Mechanism**

At Paragraphs 513-521 of the NPRM, the Commission proposes to reverse certain forbearance decisions (or non-decisions where the forbearance went into effect by operation of law). In connection with NTCH's 2014 Petition, there was some debate about whether the rescission of forbearance constituted a rulemaking proceeding that would have to be subject to the normal notice and comment rulemaking procedures. The Commission did not resolve that issue in connection with the earlier Petition, but it here it has taken a firm position not to decide whether a rulemaking proceeding is necessary in order to rescind an earlier forbearance action. The Commission has opted in this instance to use the rulemaking vehicle to consider the proposed rescission action, but it did not rule out the use of other procedures in other circumstances. In NTCH's view, both the grant and the rescission of forbearance are subject to varying procedures. Where a proposed forbearance would apply to an entire industry, it makes sense to apply typical notice and comment rulemaking procedures to the process. This ensures broad input from all potentially affected parties. But where the proposed forbearance relates only to a single firm or a small group of firms, the big club of a rulemaking proceeding is neither required nor appropriate.

The important point here, however, is that the rescission or reversal of a forbearance grant is within the Commission's power to effect, a seemingly self-evident proposition which some parties have chosen in the past to contest. The FCC suggests here, however, that it may simply reassess an earlier grant of forbearance as it "reasonably see[s] fit based on changes in market conditions, technical, capabilities, or policy approaches to regulation" of business data

services,” citing *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009). This formulation seems to leave the Commission some discretion to rescind a forbearance grant even when the three factors which justified the grant of the forbearance petition in the first place no longer apply. To the contrary, the Commission is *required* by the statute to rescind a grant of forbearance when all three of the necessary forbearance criteria are no longer present. Application of the normal statutory mandates should be the rule, with forbearance the exception that can only remain effective while the three statutory criteria for forbearance persist. Otherwise the evils that the statutory scheme was designed to prevent would be lawful under conditions which Congress had expressly assumed would not exist. Accordingly, once any one of the three criteria ceases to be true, the predicate for forbearance under the statute disappears and the forbearance must be rescinded.

### **III. The Need for Intervention in Noncompetitive Markets**

Of overarching significance in the Commission’s Special Access NPRM is its articulation of an analytic basis for finding a particular telecommunications market to be noncompetitive. The Commission indicated at Paragraphs 186-188 its intention to examine the following factors:

We analyze the data collected and the evidence submitted in this proceeding to reach preliminary evaluations as to the degree of competitiveness in BDS markets. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets with increased private sector deployment of advanced services. In conducting this analysis, we take a forward-looking view of technological and market changes.

We examine the effectiveness (and likely effectiveness) of competitive restraints, to identify where market power exists in BDS markets. We focus our analysis on BDS prices, and terms and conditions, and consider the effectiveness of current competitive restraints and whether market power, where it exists, has enabled unreasonable pricing or other practices or an ability to unlawfully exclude competition.

To distinguish product markets, we generally look to include products in the same market if they are reasonably interchangeable, with differences in price, quality, and service capability being relevant. In the case of geographic markets, we look to supply, rather than demand substitution. For both product and geographic markets, we do not believe it is necessarily required to engage a formal hypothetical monopolist test considering likely consumer substitution if a hypothetical monopolist imposed at least a small but significant and non-transitory increase in price (SSNIP), taking a more direct approach to demonstrate the use of market power.

(footnotes omitted).

This common sense approach grounded in basic economic theory establishes a framework for the Commission identify and then remediate with the various tools at its disposal conditions which the Communications Act abhors: the charging of unjust and unreasonable rates, something which can only happen when a company is in a position to dominate a given market. This approach is important because for too long the Commission has clung to a laissez faire regulatory credo that depends very heavily on competitive markets to prevent unjust and unreasonable rates. This credo has been so tenaciously held that it has prevented the Commission from recognizing that noncompetitive markets in this country do exist even when the evidence to that effect is starkly apparent, such as in the wireless roaming market. Here, for example, despite long and widespread complaints by users of special access data services that they were being overcharged, it took a massive data gathering undertaking to finally convince the Commission that there really is a problem which needs fixing. The Commission should adopt this same approach to assessing the competitiveness of various markets in determining whether a regulatory intervention is called for.

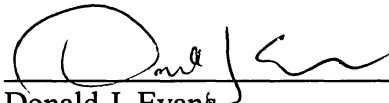
#### **IV. Conclusion**

For the reasons set forth above, NTCH urges the Commission to (i) bar the use of NDAs to cloak the terms and conditions of telecommunications service offerings which

should be transparent under the statutory scheme. To the contrary, such terms and conditions should be generally available for public scrutiny; (ii) adopt a standard for rescission of forbearance that requires such a rescission when any of the statutory prerequisites to forbearance no longer obtain, and (iii) adopt a governing principle for identifying noncompetitive markets as a trigger for regulatory intervention to prevent the imposition of unjust and unreasonable rates.

Respectfully submitted,

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